SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

MOTION OF APPELLEE TO DISMISS THE APPEAL.

Comes now the appellee, by Robert H. Kern, Samuel A. Putman, and Charles Poe, his attorneys, and moves the court to dismiss this appeal for the want of jurisdiction under subdivision 4 of rule 6 of this court, upon the following grounds:

1. Because on the third day of February, 1896, the Court of Claims passed its decree by consent of all the parties to this cause, by which all the rights of all parties in and to the

subject-matter in controversy were fully and finally determined, and the said decree was a final decree, from which no appeal was prosecuted to this court.

2. Because the decree passed in this court on the twentieth day of February, 1911, from which this appeal is prayed, was merely in the nature of an execution of said decree of February third, 1896, and defined no new rights in the parties to this proceeding, but sought merely to enforce rights already established and consented to.

3. Because although the decree of February twentieth, 1911, was regularly entered on that day the appeal in this cause to this court was not allowed and prosecuted until the seventeenth day of June, 1911, which is more than ninety days after the entry of said decree on said twentieth day of February, 1911.

ROBERT H. KERN,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Appellee.

It is hereby stipulated and agreed that the above motion to dismiss the appeal may be submitted to the court on Monday, December 11, 1911, and argument had thereon when the case is heard upon its merits.

ROBERT H. KERN,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Appellee.
JOHN Q. THOMPSON,
Attorney for the United States.

SUPREME COURT OF THE UNITED STATES

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MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLEE IN SUPPORT OF HIS MOTION TO DISMISS.

The act of October 1, 1890 (26 Stat. L., 626), which conferred jurisdiction upon the court in this case, provides for appeal to the Supreme Court of the United States as in other cases.

On May 8, 1895, upon an agreed statement of facts, the Court of Claims rendered an opinion and passed a decree construing said act, defining its jurisdiction thereunder, and determining the rights of all the parties to the cause to the moneys, lands, and common property of the Cherokee Nation. This decree was not wholly satisfactory to any of the parties, and therefore they all prayed appeals therefrom to the Supreme Court of the United States. Subsequently the

parties entered into negotiations with each other and agreed upon the terms of a decree which would be satisfactory to them all.

On February 3, 1896, all the parties withdrew their several appeals to the Supreme Court of the United States from the decree of May 8, 1895, and consented to the passage of the decree of February 3, 1896. This consent decree ascertained, defined, and determined all the rights of everybody in the entire subject-matter of the controversy, and provided machinery for the identification of the freedmen entitled to rights in the lands, assets, moneys, and common property of the Cherokee Nation, whether then or thereafter to be distributed, and under this decree, and the machinery provided by it, with the consent of everybody in interest, the portion of the estate then ready for distribution, amounting to nearly one million ($1,000,000) dollars, was distributed to the freedmen, who had thus been identified and whose rights were thus established. Since the passage of that decree another and final distribution of the same estate to the same individuals has been authorized.

The Court of Claims has found that this final distribution is not being made in conformity with its said decree of February 3, 1896, and by its decree of February 20, 1911, it has ordered the defendants to conform with and obey the original decree. From this latter decree the United States prays an appeal, and we contend that there is not and cannot be any right of appeal from a decree of this character.

The Decree of February 3, 1896, Was a Final Decree.

The decree of 1896 decided and determined that

> "the freedmen and free colored persons aforesaid and their descendants living and in being on the 3d day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood of parentage,"

and in obedience to the decree the Kern-Clifton Commission ascertained and determined who were the "persons aforesaid and their descendants, living and in being, on the 3d day of May, 1894." The present decree is no more than an additional direction, made necessary by the disobedience of the defendants, that these same persons shall have these same rights. It is therefore no more than a decree in execution of the original decree, and from it no appeal can lie.

In the present opinion (page 16) the Court of Claims says:

> "The supplemental petition of the freedmen does not seek to have new rights defined, but does seek to have established rights enforced."

The case of Carr *vs.* Hoxie (13 Pet., 460) was one where the court below had decreed the sale of property. From this decree an appeal had been taken to the Supreme Court which had been dismissed for want of prosecution. Thereafter another appeal was taken from the same decree. After this second appeal the court below passed a decree in execution of the original decree, and from this a third appeal was taken. The record in the third appeal reached the Supreme Court before that in the second. In an opinion by Mr. Justice Story, the court reserved the right to pass upon the merits of the second appeal whenever it should reach its docket, and dismissed the third appeal because it was taken from the decree of sale, and said:

> "The supplemental decree of sale is but a decree in execution of the original decree, and not a final decree in the contemplation of the acts of Congress from which an appeal like that now before us lies."

The second appeal seems to have been abandoned, for it is nowhere reported.

In the case of Callan *vs.* May (2 Black, 541) the court below had passed a decree among other things ordering the sale of property.

At the sale May became the purchaser. Callan refused to surrender possession of the land. Upon the application of May the court below passed a decree putting him in possession. Callan petitioned the Supreme Court, as the practice then was, for an appeal, and it was allowed on special allocatur by Mr. Justice Wayne. On motion of May, this appeal was dismissed, with an opinion by Mr. Chief Justice Taney, from which we quote the following extracts:

> "The proceedings in the Circuit Court after its decree was affirmed in the case of Statham, Smithson & Co. *vs.* Callan *et al.*, were nothing more than proceedings required to carry into execution that decree.
>
> * * * * * * *
>
> "The order of the court directing process to issue is not such a final order or decree in a case as the act of 1789 contemplates.
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> * * * * * * *
>
> "The allocatur of a single judge certainly cannot enlarge the appellate powers of this court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment."
>
> * * * * * * *

It therefore seems clear to us that no appeal may be taken from the decree of February 20, 1911, and if this is deemed to be an application for an appeal from the original decree of February 3, 1896, it seems equally clear that it cannot be allowed.

First, because that decree was passed more than fifteen years ago; second, because by its terms it was a consent decree, and third, because when it was entered, all the parties waived their right of appeal to the Supreme Court of the United States in express terms.

It has been repeatedly held by the Supreme Court of the

United States that no appeal will lie from a decree entered by consent. It is sufficient to refer to the case of

Pacific Railroad *vs.* Ketchum, 101 U. S.,

which is the leading case upon the subject, and to the case of

United States *vs.* Babbitt, 104 U. S., 767,

where it was distinctly held that even the United States is bound by a consent decree, and its appeal will not be entertained.

The consideration for the waiver of the appeal and the consent to the passage of the decree of February 3, 1896, was full. This consideration consisted of an agreement by everybody, for the modification of the terms of the decree, passed by the court on the 8th of May, 1895. The decree of February 3, 1896, was a final decree, settling the rights of all the parties in the property, and the subsequent decree of February 20, 1911 (the one now sought to be appealed from), is nothing but a mode of executing the original decree, like the award of an execution at law.

Whiting *vs.* Bank, 13 Peters, 6-15.

> "A decree which determines the whole controversy between the parties, leaving nothing to be done except to carry it into execution, is a final decree for the purpose of appeal, and none the less so that the court retains the fund in controversy for the purpose of distributing it as decreed."
>
> Lewisburg Bank *vs.* Sheffey, 140 U. S., 445.

In the case of Mackey *vs.* Kelso, 59 Md., 485, a controversy arose over the construction of certain clauses of a last will, and a bill was filed for their interpretation. While the controversy was pending the parties, by their solicitors, entered into a consent decree, by which they also waived their right of appeal, and a partial distribution of the estate was then made. Several years after, when the time for the final distribution of the estate had arrived, an auditor's account

was stated, making final distribution in accordance with the terms of this consent decree, and the court held:

> "The waiver of the right to appeal from the decree, excluded the right to appeal from the order finally confirming the auditor's report, distributing the residue of the estate in conformity to the decree."

As to the Decree of February 20, 1911.

The decree of February 20, 1911, was, as has been said, merely a supplemental decree for the purpose of enforcing the rights established by the decree of February 3, 1896, but, even as to that, the application for the appeal from it was not taken within the time prescribed by law. Appeals from the Court of Claims to this court must be taken within ninety days from the entry of the judgment or decree in that court (Rev. Stat., section 1086). This was not done in the present case, the decree having been entered on the 20th of February, 1911, and the application for the appeal not having been filed until June 17, 1911 (Rec., p. 248). After the decree of February 20, 1911, was passed and entered, the defendants, on March 30, 1911, filed an application for appeal to this court. On May 15, 1911, the defendants filed a motion to withdraw the application for appeal, which was allowed by the court on May 15, 1911, and on May 15, 1911, the defendants filed a motion for a new trial (Rec., p. 247). On June 5, 1911, this motion for a new trial was overruled by the court (Rec., p. 247), and, as has just been stated, the application for the present appeal was made and allowed by the court on June 17, 1911.

On the 19th of December, 1894 (Rec., p. 27), this case was fully argued in the Court of Claims and submitted. All the rights of the parties in the subject-matter of controversy were fully discussed, and, by the decree of February 3, 1896, consented to by all parties, their rights were fully adjudicated and ascertained.

On January 20, 1908, the motion to substitute Jacob Wilson as trustee for the freedmen of the Cherokee Nation for Moses Whitmire, deceased, and to file the supplemental petition was argued (Rec., p. 47), and on April 20, 1908, this motion was granted. All the questions involved were fully presented at this argument.

On May 6, 1908, the supplemental petition was formally filed, and after the Department of the Interior furnished the lists of freedmen to the court, as shown on pages 202-215 of the record, the case was fully argued on March 1 and 2, 1909 (Rec., p. 215).

March 29, 1909, claimant was allowed to proceed under his supplemental petition (Rec., p. 215).

On May 17, 1909, the defendants filed a motion for a rehearing of the order granting such leave (Rec., p. 215). On November 15, 1909, this motion was fully argued, both of these arguments involving a full rehearing of the controversy on all its points. On May 2, 1910, this motion for rehearing was overruled. On May 31, 1910, the defendants filed another motion for a rehearing, which was argued fully again on October 19, 1910, and, after that argument, the court passed the decree of February 20, 1911, now complained of (Rec., p. 215).

We submit, in support of this motion to dismiss, that there is no rule of this court, or of the Court of Claims, which prevents the running of the time limited within which an application for an appeal may be made, merely because parties see fit to file motions for rehearing. The law fixes the time within which an appeal may be prosecuted, we submit, and that time begins to run when the judgment or decree sought to be reviewed is entered in the Court of Claims. It seems to us that the conduct of the defendants in this case in retarding its progress by repeated motions for rehearing and new trial presents a striking illustration of the wisdom of such a rule. If application had been made in the lower court to stay the entry of this decree pending a motion for a

new trial, doubtless the Court of Claims would have had the right to grant such an application, but no such motion was made, and we therefore submit that the appeal was not taken in due time, even if it should be conceded, for the sake of the argument, that the decree of February 20, 1911, be a decree from which an appeal would lie.

Respectfully submitted,

ROBERT H. KERN,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Appellee.

[14566]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES,
Appellants.

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION, *Appellees.*

BRIEF ON BEHALF OF INDIVIDUAL CHEROKEES BY BLOOD, FILED BY CHARLES M. RICE, ATTORNEY, AS AMICUS CURIAE.

By leave of this Honorable Court first had and obtained, counsel appears as amicus curiae and presents, at the solicitation of a very large number of Cherokee Indians of the blood, this brief in opposition to the claim of the Freedmen who are the appellants here.

The United States has averred certain errors which counsel adopt and to which they desire to make no addition.

These assignments of error present to this court among other things:

1. The question whether the Court of Claims has jurisdiction to award the decree complained of;

2. The question whether the appellees, who were the claimants below, are not guilty of such laches in the presentation of their claim as should repel them from this court.

It is only to these two propositions that this brief is directed.

By the 9th Article of the Treaty of 1866 between the United States and the Cherokees, the latter

> "agree that all Freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees." (14 Stat. 799, 801.)

On October 1, 1890, Congress passed an act conferring jurisdiction on the Court of Claims of certain claims of the Cherokee Freedmen. (26 Stat., p. 636.) By Section I of this act it is provided that jurisdiction is conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States, to hear and determine what are the just rights in law or in equity, of the Cherokee Freedmen who are settled and located in the Cherokee Nation, under the provisions and stipulations of Article 9 of the Treaty above referred to "in respect to the subject-matter herein provided for."

By Section II of the Act the subject matter is thus defined:

> "That the said * * * Freedmen shall have a right * * * to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or in equity and unpaid to the said * * * Freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said * * * Freedmen by the Cherokee Nation, out of any money or funds which have, or may be, paid into the Treasury of, or in any way have come or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing or rent for grazing purposes on Cherokee lands west of 96 degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands and rights which shall appear to be due to the said freedmen * * * under the provisions of the aforesaid articles of agreement."

The concluding paragraph of Section 3 is in these words:

> "and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the * * * Freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation, by execution, mandamus, or in any other way which the said court may see fit."

Under the authority of this act the original petition was filed on September 26, 1891, in which claims on behalf of the Freedmen were asserted against the Cherokee Nation, extending to all the property of the nation, lands and funds.

Soon after the institution of that suit (Whitmire, Trustee, 30 Ct. Clms., 138; ibid. 180), the United States purchased from the Cherokee Nation that particular body of land known as the Cherokee outlet which comprised (to use the language of the jurisdictional act) "the Cherokee lands west of 96 degees west longitude," whereupon an amended petition was filed, averring the said purchase of these lands, and claiming an equal interest on the part of the Freedmen with that of Cherokees by blood, in the fund realized from the sale thereof.

Prior to the sale of these lands which form the real subject-matter mentioned in the jurisdictional act, the Cherokee Nation had leased these lands for grazing purposes and had received certain sums therefor which it had distributed among its citizens, to the exclusion of the Freedmen.

The court found in the suit referred to, that the Cherokee Nation had received and distributed $7,240,000, representing the amounts received from the leasing of said lands west of 96 degrees west longitude and the amount received from their sale to the United States and decreed that the Freedmen should be paid their proportion thereof, which it found to be $903,365. Whitmire vs. Cherokee Nation, 30 Ct. Cls. 180, 193, and the decree in that respect has been enforced.

The court further decreed that the Freedmen were entitled to participate thereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage might be entitled; and that in the distribution of the proceeds and avails of the public domain or common property of the Nation among the citizens thereof, by distribution per capita at any time *thereafter*, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation,

"be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were Freedmen who had been liberated by a voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter." Ibid. 193.

The last paragraph of the decree is in these words:

"And it is further ordered, adjudged and decreed, that the defendant, the Cherokee Nation pay the costs of this suit, and that if this judgment and decree be not carried out and satisfied within six months from the date hereof, the claimant may apply to this court for such further order, relief, or remedy as the plaintiff herein may deem necessary; and that if any further proceeding be had under this decree, the rights of the attorneys and counsel for the plaintiff herein to further costs and allowances be reserved to be herein determined and fixed by the court, and the court reserves the right to make all such further orders in aid hereof as to it may seem mete." Ibid. 196.

Upon the authority of this last paragraph of the decree, presumably, the supplemental petition, which is now for consideration, was filed, and the decree entered naming certain individual persons as Cherokee Freedmen and declaring them entitled to share in the general property of the Cherokee Nation.

Our propositions are:

First, that the jurisdictional act of October 1, 1890, attempted to give the Court of Claims jurisdiction to determine two things, and only two—first, whether the Freed-

men were entitled to share in the sums realized from the leasing or sale of the Cherokee lands west of 96 degrees west longitude; and second, to define the rights of the Freedmen designated in the 9th article of the treaty of 1866, as a class of persons, in and to the common property of the Cherokee Nation.

As to the first item which the court might consider, and regarding which it might render judgment, and for which it did render judgment as hereinbefore recited, there is no doubt that the court has fully exercised its jurisdiction, the moneys having been distributed in accordance with the decree.

But as to the second item of jurisdiction, namely to define and adjudicate the rights of the Freedmen in the then common property of the Cherokee Nation (its public domain and its funds held in the Treasury of the United States), it is respectfully submitted to the court that the act did not confer the jurisdiction which the court assumed. This is said upon the authority of the cases of Muskrat vs. The United States and Brown and Gritts vs. The United States, 219 U. S. 246. These cases having been very recently decided, will be readily recalled by the court as presenting an attempt on the part of Congress to have the Court of Claims and this Honorable Court to decide whether certain acts of Congress were in violation of the Constitutional rights of the plaintiffs. This court declared in the opinion that to pass upon the question there presented would be a requirement by Congress, of the Supreme Court "to give opinions in the nature of advice concerning legislative action, a function never conferred by the Constitution, and against the exercise of which this court has steadily set its face from the beginning" (p. 362) and the opinion declared that the actions presented no justiciable controversy within the authority of the court.

At the time of the passage of the jurisdictional act in behalf of the Freedmen, October 1, 1890, the Cherokee Nation was the owner of a reservation comprising several millions of acres and of a communal fund held in trust for the Cherokees in the Treasury of the United States. None of these lands had been allotted and none of the funds distributed and when Section 2 of the act authorized the Freedmen to begin and prosecute a suit "for all moneys, lands and rights *which shall appear to be due* to the said Freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement, Congress certainly did not confer upon the Court of Claims the power to determine the rights of the Freedmen in the still communal lands and funds of the Cherokee Nation. At the time of the passage of the jurisdictional act there was nothing to evidence that the distribution of the lands and funds was even in contemplation. The Cherokee Nation was a body politic maintaining its own government, with the consent and subject to the supervision of the United States, and holding its lands and funds as national lands and funds. To require the Court of Claims and this Honorable Court, to decide in advance what the rights of the Freedmen should be when, if ever, those lands and funds were distributed, was to ask of the courts an extension of judicial power against the exercise of which this court "has steadily set its face from the beginning."

But let us suppose that this act did confer jurisdiction upon the Court of Claims to decide in advance what the rights of the appellees were in the undistributed communal property of the Cherokee Nation, and further that this court would have taken the jurisdiction to declare in advance what those rights were; our position is that with the adjudication of the Court of Claims that the Freedmen designated in the 9th article of the treaty of 1866 were con-

sidered by the Court of Claims under this jurisdictional act, *as a class*; that is to say if the act conferred jurisdiction, the jurisdiction was limited to the declaration that those Freedmen who had been liberated by a voluntary act of their former owners or by law, and those free colored persons who were in the country at the commencement of the rebellion and were then residents therein, or who might return within six months, should have all the rights of native Cherokees. The act did not give the Court of Claims jurisdiction to determine who those Freedmen were; it did not authorize them to find the names of the individuals; and the Court of Claims so considered it, because, in their decree of February 3, 1896, they vested the Secretary of the Interior with authority to prepare the roll of individuals upon which the money judgment was to be distributed; and in the subsequent decisions in the case of Journeycake and others (31 Ct. Cls., 143) the court said (referring to the Secretary of the Interior):

> "He is charged by law with the duty of ascertaining their individual identity, of determining who are Delawares and who are Shawnees and of maintaining their individual rights, the question of identity of individuals entitled to the benefit of the treaty, being in its nature political, and within the Secretary's official jurisdiction, the court would adopt his determination if the complainants were to be named individually in the decree."

Accordingly, when the Commissioners appointed by the Secretary of the Interior applied to the Court of Claims for instructions as to the enrollment of an individual Freedman, the court announced that it was of the opinion that the Act of March 2, 1895 (28 Stat., 910), prescribed the manner in which payments per capita shall be made and that

the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.

In the opinion (Record, 225) reference is made to the statement at the foot of the final decree—"and the court reserves the right to make all such further orders in aid hereof as to it may seem meet," and this is taken by the court in its present opinion as continuing its jurisdiction for the purpose of the present decree; but when the preceding words in the last paragraph of this decree are read (30 Ct. Cls., 196) it will appear that this had reference to the distribution of the $903,365 which the court had adjudged to the Freedmen as being their proportion of the fund realized from the leasing and sale of the lands west of the 96th degree west longitude. That paragraph (cited hereinbefore) decrees that if the judgment of the court be not satisfied within six months from date, the claimant might apply to the court for such further order, relief or remedy as he might deem necessary; evidently having reference only to the authority in the jurisdictional act expressed in these words:

> "And all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the * * * Freedmen and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus or in any other way which the said court may see fit."

Inasmuch as the judgment of the court decreeing the payment of moneys was applicable only to funds which had been already received and distributed by the Cherokee Nation, this language of the jurisdictional act just cited, giving the court the power to execute its decree, manifestly applied only to the payment of the $903,365. By no possi-

bility could it apply to a judgment that the Freedmen were entitled to share in the communal lands and funds of the Cherokee Nation, because in the first place it was not a money judgment and in the second place there was no subject-matter to which an execution, mandamus or injunction might apply. The lands were still communal, the fund was still national. No effort had been made to allot the one or distribute the other, and so far as the legislation shows, none was in contemplation. The whole effect of the judgment of the court respecting the rights of the Freedmen as to the communal lands and funds was to declare that when hereafter, if ever, the lands were divided, or the fund distributed, those Freedmen designated in the ninth article of the Treaty of 1866 should share. As to this item, the court was given no power to enforce its decree. It could not enforce it by execution, because there was nothing upon which an execution could be levied. It could not enforce it by mandamus or by injunction, because there was no attempt and no suggestion of an attempt at the time to exclude the Freedmen from participation in those lands and funds.

It is to be noted that this provision does not authorize the issuance of any process, ordinary or extraordinary, against any officer of the United States.

Accordingly we insist that if the Court of Claims had the power to decree the rights of the Freedmen in the lands and funds of the Cherokee Nation to be distributed in the coming years, it exhausted its jurisdiction when it adjudged that those Freedmen designated by the 9th article of the treaty of 1866 were as a class entitled to share, and charged the Secretary of the Interior with the duty of ascertaining and identifying them.

THE APPELLEES WERE GUILTY OF LACHES IN NOT HAVING TAKEN EARLIER ACTION TO SECURE THEIR ALLEGED RIGHTS.

It would seem to go without saying that if the appellees in this case had any right to enrollment and were denied that right, they could have made application for a writ of mandamus in the Supreme Court of the District of Columbia to compel the Secretary of the Interior to enroll them together with other Cherokee Freedmen.

Such action could have been taken, and ought to have been taken when the Secretary of the Interior on May 11, 1900, issued instructions to the Dawes Commission to disregard the Kern-Clifton Roll in proceeding under the Act of June 28, 1898 (Record, p. 70-72).

In Kimberlin's Case (104 Federal Reporter, 716), which was decided October 5, 1900, it was held that the Dawes Commission had exclusive jurisdiction to make the rolls and that the court was without jurisdiction to review their acts.

Again in July, 1902, when the general allotment act was passed, which was the subject of consideration by this Honorable Court in the case of Brown vs. Gritts, cited herein, Congress provided the method of allotment and declared who should be entitled to be enrolled for the purpose of sharing in the lands and funds; an opportunity was given then to the appellees to assert their rights, since they were not within the contemplation of the act.

During the consideration of the various cases cited on Rec., pp. 108-192, another opportunity was given to these appellees to assert their alleged rights; and finally, when the act of April 26, 1906, was passed it fixed a positive date for the closing of the rolls, and these appellees who had not been enrolled could have asserted whatever rights they may have in and to the lands and funds.

The appellees did none of these things, but permitted Congress to pass act after act, giving to the executive branch of the Government the authority to make the Cherokee rolls, distribute their funds, and allot their lands. They knew, or ought to have known, that 4,924 Cherokee Freedmen had been enrolled by the Dawes Commission and that they were not among that number, yet they did nothing until the filing of the supplemental petition in this case on September 30, 1907, long after the rolls were closed.

It is respectfully submitted that they can occupy no superior position to that of the Pottawatomies represented by Pam-to-pee (148 U. S., 691), who permitted the fund due the tribe to be distributed, and then attempted to assert their claims to the fund.

It is submitted that in view of this long inaction upon the part of the appellees they ought not to have any standing, now the question has been decided.

The appellants, the United States, have presented in their brief the propositions that the Court of Claims has no power to issue a writ of injunction as respects the alleged rights of these Freedmen. We desire to join in that contention, alleging as hereinbefore suggested that the power to grant extraordinary process is limited to the money judgment which the Court of Claims was authorized to award under the original act.

It is also presented by the United States that Congress conferred upon the Secretary of the Interior exclusive jurisdiction to make the Cherokee rolls. That is a position also which the appellants herein represented desire to take.

It is, however, so fully argued in the brief for the United States that an argument here would be a mere repetition.

CHARLES M. RICE,
Attorney.

IN THE

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THE CHEROKEE NATION AND THE UNITED STATES,
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vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF

ON BEHALF OF THE KEETOOWAH SOCIETY, A CORPORATION, RICHARD M. WOLFE, PRESIDENT, PRICE COCHRAN, BILL MANKILLER, GEORGE DUCK, THOMPSON HUMMINGBIRD, JACKSON REDBIRD, GEORGE REDBIRD, GEORGE GREECE, ROBERT MEIGS, WILLIAM COCHRAN, WATT CHRISTIE, ROBERT CARRETT, MIKE CAREY, JACK HAWKINS, ALEX HAWKINS, WILLIAM WOODALL, BOONE MEIGS, JOHN M. SANDERS, LEVI TUCKER, FRANK J. BOUDINOT, ISAAC GREECE AND LEVI B.

GRITTS; THE REPUBLICAN KEETOOWAH SOCIETY, JOHN MCINTOSH, HEAD CAPTAIN, THOMAS TUCKER, CANDY MINK, JOE FOX, ALLISON MANUS, A MINOR; GENIE GRITTS, A MINOR; JOE HILDEBRAND, E. T. WOLFE AND E. C. GREECE; AND THOUSANDS OF OTHERS, CHEROKEES BY BLOOD.

STATEMENT.

The Keetoowah Society, on behalf of the members of which this brief is, by leave of Court, filed, is an organization established in the year 1859, incorporated in the year 1905 under the laws of the United States, having a membership consisting exclusively of Cherokees by blood, and having its principal office at Tahlequah, Oklahoma, formerly the capital of the Cherokee Nation.

The purposes and objects for which the Society was formed, and for which it exists, are to protect the rights and interests of Cherokees by blood in their common lands and funds, and to protect the personal liberties and individual property rights and interests of its members and of all other Cherokees by blood having like interests with them.

The history of the litigation of this case is, in the main, fully set forth in the briefs herein filed on behalf of the Freedmen and of the United States; and the special purpose of this brief is to show that the Cherokees by blood, by and through the above named Keetoowah Society and its officers and leading members, have at all times protested against the rights claimed by and for the Cherokee Freedmen to share in the final distribution in severalty of the lands and principals of the vested funds, tribal property of the Cherokee people, owned by the Cherokees as members of the community, the original Cherokee Tribe, parties to the treaty of May 6, 1828 (7 St., 311), and their descendants.

The Cherokees by blood on whose behalf this brief is filed did not have such individual interest in the lands and funds now before this Court, as to permit them to be parties to the suit in 1896.

At this time, however, each has an individual estate of inheritance in said lands and funds, and is therefore interested in this suit as an individual.

It is their purpose in this brief now to protest again that the only rights ever acquired by Cherokee Freedmen in Cherokee property were the rights bestowed upon the Freedmen under the treaty of July 19, 1866 (14 Stat., 799), which rights were limited to those possessed by other *members of the Cherokee Nation,* as citizens thereof, which did not extend to right of soil or interest in the vested funds of the Cherokees.

SUBJECT MATTER OF SUIT.

The subject matter of the suit in 1896 was a particular fund amounting to $7,240,000, which had been wrongfully paid out per capita by the Cherokee National Council to certain members of the Nation of Cherokee blood to the exclusion of the Freedmen of the Nation. The subject matter was limited solely to this fund.

The lands and principals of the vested funds belonging to the Cherokees were not then subject to distribution in severalty. The lands and funds which are now being divided and distributed among the Cherokees were not, and could not have been, considered a part of the subject matter at that time.

ERRORS OF THE COURT.

So far as concerns those on whose behalf this brief is submitted, the principal error complained of is that the decree of the Court of February 20, 1911, should have de-

clared what were the just rights in law or equity, if any, of the freedmen under Article 9 of the treaty of 1866 in the lands and vested funds of the Cherokees, for the first time made payable per capita by the provisions of the act of July 1, 1902, independently of any interest in, or control over, the same that the Cherokee National Government may have had or exercised prior to the time provided for allotment and distribution of the said property under the act of July 1, 1902; and especially that the said decree did not declare that said lands and vested funds were, and are, owned by those persons enrolled, or to be enrolled, under and by virtue of the terms of the act of July 1, 1902, exclusively of all freedmen or free colored persons.

Ownership of the lands and vested funds communal, not national; in the people, not in the Government—not affected by citizenship in the nation.

The common, or communal, property of the Cherokees at the time of the adoption of the constitution in 1839 consisted of:

First. The seven million acres of land described in the second article of the treaty of 1828 (7 Stat., 311) and in the first article of the treaty of February 14, 1833 (7 Stat., 414), known as the "Home Tract" or "Cherokee Reservation."

Second. The free and unmolested use of the country known as the "Cherokee Outlet," lying immediately west of the seven million acres.

Third. Certain funds in the Treasury of the United States.

This property possessed no national characteristics at that time, was owned by the tribe as a community, was subject to sale or other disposition only by the tribal au-

thorities, to wit, the Chiefs and Headmen of the Tribe, who in disposing of the property acted solely as the agents or representatives of the communal owners, to wit, the members of the tribe.

The Cherokee Constitution was adopted in 1839, Article 1 of which, after having by Section 1 described the Cherokee domain and identified it as the land described in the treaty of 1833, which comprises the property in controversy in this Court, delegates to the Cherokee National Council the power to control the use of the lands of the Nation, and provides by Section 2:

> "The lands of the Cherokee Nation shall remain common property; but the improvements made thereon and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them."
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> * * * * * * * * *
>
> "Moreover, the National Council shall have power to adopt such laws and regulations, as its wisdom may deem expedient and proper, to prevent citizens from monopolizing improvements with the view of speculation."
>
> Cherokee Constitution, Art. 1, Sec. 2.

Thus, after defining in Section 1 the territorial boundary of the country to be occupied by the Cherokee Nation, that is, the body politic, the Constitution declares that the lands within that boundary shall remain common property; that is, that they shall remain as they were before the body politic was organized, which means that they should remain the community property of the Cherokee Tribe.

At the time of the adoption of the Constitution in 1839 the membership of the Cherokee Tribe was the same as the membership of the Cherokee Nation. In the course of

time certain persons became associated with the tribe through intermarriage, etc., and enjoyed the rights of citizenship, but they were forbidden by the Constitution from participating in the ownership of the tribal, or communal, property, and when the Constitution of 1866 was adopted, in order that there might be no question about the constitutional provision of 1839 confining the communal property to the members of the Cherokee Tribe, this provision was readopted.

Therefore, those persons who had thus become associated with the tribe were again expressly prohibited from participating in the ownership of the tribal property thereof, and all persons were again put on notice that citizenship in the Cherokee Nation did not confer the right to participate in the ownership of the tribal property.

The Cherokee people, having dedicated to the Cherokee National Government the right to occupy and use the Cherokee domain, nevertheless did not delegate to that government the power to add a single member, by adoption or otherwise, to the tribe, and from 1839 to 1866 no person by act of the National Council or otherwise could be so added to the tribe.

This being so, no matter what powers the Cherokee National Council possessed in regard to the admission of persons to become citizens of the Cherokee Nation as a body politic, it had no power whatever to admit any person to become a member of the tribe with any of the rights of ownership in communal property possessed by members of the tribe alone.

This is clearly shown by the decision of this Court in the Intermarriage Cases, 203 U. S., 76, where, after discussing the rights conferred upon citizens by the very sections of the Constitution under which the Freedmen claim, the Court, at page 86, *infra*, held that they acquired civil and political rights only.

The National Government exercised the dual function in the Cherokee Nation:

First. Of administering the National affairs for all the people of the Nation, such as the enactment of laws, the construction of highways, the maintenance of schools, the enforcement of police regulations, the collection of revenues, etc., and,

Second, it assumed the management of the communal property of the communal owners residing in the Nation. In this latter capacity it acted as the agency for the communal owners in the protection and control of this property. This control by the National Council was not delegated to it directly by the owners, but was assumed by it and acquiesced in by the owners as a proper agency for the management and preservation thereof under its power to prevent monopoly of improvements. (Article 1, Sec. 2, Cherokee Constitution.)

The National Council had no authority, either inherently or by delegation, to dispose of the corpus of this estate, or to convert it to national purposes. The proceeds derived from the leasing of lands and the interest on the vested funds could be used for national purposes; but here the control of the communal property by the National Council ceased.

THE ORIGINAL WHITMIRE DECISION AND DECREE ARE WITHOUT FOUNDATION IN LAW.

The judgment of the Court of Claims in the original Whitmire case was based upon a wholly erroneous understanding of the Constitution of the Cherokee Nation.

The Court decided properly that the treaty of 1866 did not confer on the Freedmen any property rights whatsoever, but held that the amendment to the Cherokee Constitution made in 1866, after the execution of the treaty

and for the purpose of carrying out its provisions, did confer upon the Freedmen the same property rights as the Cherokees themselves enjoyed. That decision was rendered March 4, 1895.

Subsequently the Intermarried Whites based their claim to property rights on the same provision of the Constitution of 1866, and this Court, in its decision filed November 5, 1906, declared that said Amendment to the Constitution related solely to political rights and conferred no property rights on any one. Clearly, therefore, the opinion of the Court of Claims in the Whitmire case was founded upon error and the basis of its decision has been completely taken from under it. The Court of Claims, discussing the treaty of 1866, declared:

> "The United States did not, it may be conceded, stipulate for more than that the Freedmen should become citizens 'with all the rights,' that is, political rights, 'of native Cherokees,' and that 'all laws of the Cherokee Nation shall be uniform throughout said nation,' and that the President of the United States should have the power to secure to the Freedmen 'a fair and equitable application and expenditure of the national funds'; but the constitution of the Cherokee Nation then came into the case and defined what citizenship was, and in express terms ranked 'Freedmen' with 'native-born Cherokees,' and the lands of the nation as 'common property.' If those lands had remained common property, unsold, and held for governmental purposes, it seems incontrovertible that all classes of citizens, Cherokees by blood and Cherokees by adoption, would have been, as citizens, equally and mutually entitled to the national benefits which might be derived from them" (30 Ct. Cl. at p. 157).

This formed the basis of the Court's judgment and decree.

This Court, speaking with reference to the same amendment of the Cherokee Constitution, quoted it as follows:

"Sec. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a bona fide resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, and all Freedmen who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the nineteenth day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

And the Court, by Chief Justice Fuller, declared:

"We cannot accept the view that this amendment amounted to a grant of property rights, or operated to enlarge the authority of the National Council in respect of the readmission of former members of the Nation."

"The amendment (found in that part of the Constitution in respect to officers and elections) must be taken as a whole, and related to eligibility to a seat in the National Council and not to property rights. The contention that the words 'citizens of the Cherokee Nation' should be construed as relating to the constitutional provision of 1839 that the lands of the Nation should be common property, is without merit in view of the provisions themselves."

(Cherokee Intermarriage Cases, 203 U. S., 85-6.)

It is well known as an historical fact that the amendments of the Cherokee Constitution, adopted in 1866 immediately following the execution of the treaty, were adopted solely for the purpose of giving sanction by the Cherokees themselves to the new provisions of the treaty of 1866 relating to Freedmen and others.

It can hardly be supposed that if the Cherokees failed to grant property rights to the Freedmen when negotiating with the authorities of the United States in 1866, they would immediately thereafter, of their own will, free from the influence of the United States, give to the Freedmen property rights which had not been given by the treaty. If the rights of the Freedmen were to be in any way altered, the presumption would be that they would be diminished by the Cherokees, and not enlarged.

As a matter of fact, the Cherokees simply embodied in their Constitution the rights which had been conferred upon the Freedmen by the treaty of 1866, and they conferred upon them no other rights.

Certain rights of Cherokees by blood, as shown herein, were not passed upon, or disposed of, by the Court of Claims in 1896, for the reason that the issues involving those rights, between the Cherokees by blood and the Cherokee freedmen, could not then be raised.

It was the duty, however, of the United States, as trustee for the Cherokees, when the supplemental petition of 1907 was filed in the Court of Claims, to present those issues, and the decree of the Court rendered in the case was, and will remain, incomplete until the rights of Cherokees by blood, as against the claims of the freedmen to a right to participate in the final distribution of the lands and the vested funds of the Cherokees, have been properly adjudicated.

The subject matter now involved in the suit, and with relation to which this brief is filed, came into existence after the decree of 1896, but prior to the filing of the Supplemental Petition by the Substitute Trustee in 1907.

The purpose of the supplemental bill, briefly stated, was to determine the rights of Cherokee Freedmen and their

descendants, not solely the rights of the persons enrolled on the Kern-Clifton roll, to participate in the final allotment of Cherokee lands and distribution of Cherokee tribal funds.

Such rights, therefore, as the Cherokees by blood had in this property independently of, and distinct from, the rights of the citizens of the Cherokee Nation, or the rights of the Cherokee Nation as a body politic, should have been presented and urged by the United States, and should have been protected by the decree of the Court, but those rights have never been considered by the Court, and the Cherokees by blood have not been permitted to intervene in the case and defend their rights.

When the decree of 1896 was rendered the only justiciable matter in the suit was the right of the Freedmen to a pro rata share of a large sum of money that had been paid and distributed by the Cherokee National Council to a certain class of citizens of the Cherokee Nation, their proportionate part of which the Freedmen contended should have been distributed in like manner to them.

At that time, therefore, the controversy, and the only controversy, was one between the Cherokee Freedmen and the Cherokee National Government. No issue was raised as to the rights of Freedmen to participate in the final distribution of the lands or vested funds of the Cherokees, over which the Cherokee National Government never had any legitimate control, but only the right to have their equal pro rata share of any distribution of National moneys or property that might be made under the authority and direction of the Cherokee National Council to citizens of the Cherokee Nation.

Speaking of this very property, Chief Justice Nott, in his opinion in the Whitmire case (30 C. Cl. at page 158) says:

"It is possible that there still exists or hereafter may be revived a species of property which is an exception to the previously expressed conclusions of the Court. To prevent future misapprehension and complication this will now be noted." * * * And at p. 159: "Payment per capita" (that is, the right to per capita shares in severalty of land or funds) "must be regarded as the badge or recognition of an individual communal interest as distinguished from a governmental or national ownership. Such funds are not 'common property' within the intent of the Cherokee Constitution, but trust estates in the custody of the United States for the benefit of designated individuals or communities. Over them the Cherokee Government has no legitimate control, and in them the freedmen have no estate or interest."

CHEROKEE NATIONAL GOVERNMENT POWERLESS.

The Cherokee National Council had no authority to pay or distribute to citizens of the Cherokee Nation any part of the tribal or communal property which belonged to the Cherokees as a community. In other words, the Cherokee National Council never had authority to dispose of the lands or vested funds of the Cherokees.

We respectfully deny that the Court of Claims had power under the original jurisdictional act to enter a decree fifteen years ago which would control the future disposition of the lands now in controversy, which lands were not mentioned in that case, which were not then allottable or divisible, and as to the allotment or division of which no act of Congress had been passed and none had been even suggested.

Even if such power then existed in the Court, it must be clear that persons not then parties to the case should not be bound by it in view of the statutes passed and the decisions

rendered in kindred cases and in view of the facts developed since the decision was filed in the original Whitmire case.

The wrong and injustice in the original opinion and decree are manifest, because:

1. The opinion and decree in that case related solely to the share of the claimants in certain funds previouly ordered to be distributed by the Cherokee National Council without authority of law. The whole case rested on the fact that there had been a wrongful conversion of funds and an illegal distribution of the same to some of the citizens of the Cherokee Nation.

2. The title to the lands now being allotted, known as the "Home Tract," is not, and never was, in the Cherokee National Government, but was lodged in the Cherokees, and the Cherokees were not parties to the original Whitmire case.

3. The finding of the Court of Claims in the original Whitmire case that the amendment to the Cherokee Constitution made in 1866 conferred full property rights has been overruled by this Court in the Cherokee Intermarriage cases, holding that said amendments conferred no property rights whatsoever.

4. The consent decree filed in the Whitmire case can relate only to the funds directly involved in that case at that time, and cannot be binding as to lands not then involved in the controversy, held by a different title and by persons not parties to the suit. (Muskrat, *et al.*, vs. U. S., 216 U. S., p. 346.)

5. The Cherokee Chief and the Cherokee National Government never had any right in, or power of disposition of, Cherokee lands, and their consent to the amended decree of February 3, 1896, in the original Whitmire case, could not have been intended to affect in any manner the future dis-

position of Cherokee lands, which were not then involved in the controversy, and if their consent to such decree was intended to affect the disposition of such lands, such consent would be void and of no effect.

6. The United States did not join in signing the consent decree.

CONCLUSION.

The Act of July 1, 1902, which provides for enrollment of persons entitled to allotment in the Cherokee Nation, nowhere makes provision for the enrollment of the Cherokee Freedmen except by reference to Section 21 of the Curtis Act of June 28, 1898 (30 St., 495). Therefore the Freedmen must look to the Curtis act for their right to enrollment. This act provides in Section 21, for the enrollment of Freedmen in strict compliance with the decree of the Court of Claims of February 3, 1896. This decree provides that the Freedmen shall be enrolled for participation in the distribution of national property only.

Therefore, in order to entitle the Freedmen to participate in the lands and vested funds of the Cherokees, the subject matter of the present proceedings, such lands and funds must first have been converted into national property.

There is no evidence in this record to show that such conversion has ever been made, and in fact it is not claimed that such has been done. It is a manifest impossibility for this to have been done, as the National Government was practically abolished by the Curtis Act of June 28, 1898 (30 St., 495), the officers of which government were prohibited from receiving or disbursing Cherokee funds.

The leasing of the lands, etc., from which the principal revenue of the Nation was derived, was transferred from the Cherokee Government to the Secretary of the Interior by Sections 13, 16 and 23, and the funds directed to be

deposited in the United States Treasury to the credit of the tribe by Section 16. It was further provided by said Act in Section 26

> "That on and after the passage of this act, the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the Courts of the United States in the Indian Territory."

That the lands and vested funds remained unconverted up to the date of the passage of the Act of July 1, 1902, is not disputed. Therefore the National Government, having prior to the Act of July 1, 1902, been rendered incapable of again converting any lands or vested funds of the Cherokees into National property, and the United States having accepted the trust under the Act of July 1, 1902, of allotting these lands and distributing these funds to the rightful owners, it is manifestly impossible for any such conversion and pro rata distribution to have been made of this property, by the Cherokee National Government, as was made of the funds dealt with by the Court of Claims, and as was contemplated by its former decree.

For the foregoing reasons we respectfully submit that the decree of February 20, 1911, should be reversed.

C. C. CALHOUN,
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JOHN J. HEMPHILL,
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Amici Curiae.